

November 8, 2013

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**VIA E-MAIL AND REGULAR MAIL**

Ms. Annette Lang  
Senior Counsel  
Natural Resources Division, U.S. Department of Justice  
P.O. Box 7611  
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Washington, D.C. 20044-7611

Re: USS Lead Site - Additional PRPs

Dear Annette:

At our last meeting you asked us to provide a discussion on the basis for identifying some of USS Lead's customers as potentially responsible parties, PRPs in this matter. You indicated that you were concerned regarding the basis for such liability in light of the Supreme Court's decision in *Burlington Northern* and the Superfund Recycling Equity Act (SREA). We submit that this liability cannot be easily discounted and that there may well be significant volume parties among the customers which would justify the effort to include them.

EPA has sought cost recovery and imposed liability against numerous "arrangers" at sites where materials were recycled/reclaimed but at which there were also significant releases. Other than the difficulty and expense of locating and evaluating site records (with which DuPont is prepared to assist) there is no reason why such liability cannot be imposed here, especially if USS Lead is representing it is unable to fund the remedy for OU-1.

First, there should be no question that USS Lead processed a wide variety of metal by-products shipped from other facilities during its operations and that resulted in the lead that the facility released to the surrounding neighborhood. According to its October 26, 2005 response, to EPA, USS Lead had a 50 ton/day blast furnace at its Site since at least 1948, at which it processed "antimony-lead slag" from its operations, "along with battery plates and other secondary materials to produce various grades of antimonial lead". According to its response, in the early 1970s a "new 100 ton blast furnace was installed to replace the 50 ton furnace" and "secondary lead smelting continued at the facility until October 1985..." According to the March 24, 1993, TechLaw Report on transactions at the Site prepared for EPA, in the documents provided by USS Lead "EPA and TechLaw identified 70 different main categories of wastes". Many of the categories are described as "pigs", "powder", "dross", "speiss", "plates", "sludge", "skimmings"

# M U C H S H E L I S T

Ms Annette Lang  
November 8, 2013  
Page 2

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and "slag". Whether the providers of those by-products can be identified as arrangers cannot be determined based solely on an abstract evaluation of USS Lead's operations but must consider whether these customers are entitled to exemption under SREA and cases regarding the "useful product" defense. This requires a factual inquiry into the materials sent, the details of the transactions and the intent of the customers.

Section 127 exempts from liability persons who arranged for the recycling of "recyclable materials" at a CERCLA facility. These persons bear the burden of proof in asserting the exemption. "Recyclable material" specifically includes "scrap metal" which is defined as bits of pieces of metal parts or metal pieces combined together with bolts or soldering. USEPA SREA Guidance (August, 2002) states that "the size of the metal is important" and that "metal which is powdery or dust like" may not meet this definition. (Guidance 3.1) In addition, EPA notes that "residues generated from smelting and refining operations (i.e. drosses, slags and sludges)" are excluded from the RCRA definition of "scrap metal" (50 Fed. Reg. 624, January 4, 1985) and therefore may be excluded from the definition under SREA. (Guidance fn. 9) On the other hand at least one court has held that liability for lead containing scrap metal under CERCLA should not be limited by RCRA's scrap metal definition. (*RSR Corp. v. Avanti Development, Inc.*, 2000 WL 1449857, p. 10 (N.D. Ind. 2000)) Another court refused to grant summary judgment in favor of a PRP who brought dross to a metal recycler. (*Cal. Dept Toxic Substances v. Interstate Non-Ferrous Corp.*, 298 F. Supp2d 930, 962 (E.D. Cal. 2003)) The exemption specifically does not apply to metals which were melted prior to the recycling transaction. (Guidance 3.3)

Finally, the person seeking to use the exemption has to show that they met all of the other SREA requirements including documentation that the material met a commercial specification, that a market existed for the recyclable material, that a substantial portion of the recyclable material was available for use as a feed stock for a new product and that the material was a replacement for a raw material. Called upon to review liability of customers at a lead processing facility, the Ninth Circuit affirmed the denial of summary judgment for the customers under SREA, agreeing that they had failed to show that the material met a specific commercial grade. (*Cal. Dept. Toxic Substances v. Alco Pacific, Inc.*, 508 F. 3d 930, 940 fn. 3 (Ninth Cir. 2007)) All of this points up that the focus of the inquiry is not on the characterization of USS Lead's operations, but an evaluation of the material sent and the nature of the transaction.

The same is true for the application of the "useful product" defense under CERCLA. Like SREA, the burden is on the PRP to demonstrate that the material sent to the site meets the terms of this defense. In evaluating the defense, courts look to several factors to determine whether the transaction involved an arrangement for disposal or treatment of a hazardous substance. These include the commercial reality of the transaction and the value of the product in question, the intent of the seller to either sell a product or dispose of a waste, and whether the material is a principal product or by-product of the seller. (*Alco Pacific*, at 938)

# M U C H S H E L I S T

Ms Annette Lang  
November 8, 2013  
Page 3

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In the recycling/reclamation context, the process and the transactions must be evaluated to determine whether materials were sent to the recycler for treatment to recover useful metals and rid the seller of the burden of impurities. *Alco Pacific* involved agreements where the customers sent materials to the recycler and obtained a credit towards their repurchase of refined metal. In *Tex Tin Settling Defendants v. Great Lakes Carbon Corp.*, 2008 WL 4376363 (S.D. Texas, 2008), the court refused to grant summary judgment to a supplier who provided a spent nickel catalyst to a metal recovery site, holding that spent materials are usually waste and that the supplier had not shown that the pricing or any of the other specifics of the transaction supported another conclusion.

The fact specific nature of the inquiry results in frequent denials or reversals of summary judgment for PRPs. In *Alco Pacific*, the court relied on the above factors to reverse summary judgment for the customer defendants, holding that the dross and slag sent to the site were byproducts rather than principal products and that because the customers obtained refined metal products in return, the transactions were more accurately for the treatment of a hazardous substance rather than the sale of a useful product. In *Interstate Non-Ferrous Corp.* the court refused to grant summary judgment for a dross supplier to a metal recovery facility despite what it characterized as the weakness of the state's case.

At present, it is hard to see that EPA is in a position to rule out actions against USS Lead's suppliers in light of the many facts which support liability. For example, according to its October 17, 2005, response to EPA, NL Industries sent over 2 million pounds of "reverb slag" to the Site from the NL McCook facility. The response indicates that a lesser weight of reclaimed metals were returned to NL, "the maximum amount of material that could have remained at the [USS Lead] site is 435,029 pounds." In its December 23, 1991, response to EPA, Johnson Controls indicates that between approximately 1974 and 1986 it sent to the Site spent lead acid batteries, lead drosses, lead scrap, sump mud, in-plant junk batteries, and baghouse dust. Under the case law above, none of these transactions would be protected either by SREA or the useful product defense.

There are probably other high value, viable targets in addition to NL Industries and Johnson Controls. A review of USS Lead's customer lists should provide information sufficient to identify and then include other PRPs whose inclusion would justify the effort spent to bring them in. DuPont is prepared to work with the EPA in order to help identify additional companies. But we see no reason why EPA should foreclose consideration of the other PRPs at this point based on the information already in EPA's possession.

# **M U C H   S H E L I S T**

Ms Annette Lang  
November 8, 2013  
Page 4

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We would appreciate the opportunity to discuss this further at your next conference, but please contact me or Bernie if you have specific questions.

Sincerely,



David L. Rieser

cc:    Bernard Reilly  
      Sathya Yalvigi  
      Michael Elam  
      Douglas Reinhart